

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

AMALGAMATED TRANSIT UNION,
LOCAL 1729,

Plaintiff,

v.

FIRST GROUP AMERICA, INC.
and FIRST STUDENT, INC.

Defendants.

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Civil Action No. 2:15-cv-00806

Judge Terrence F. McVerry

**PLAINTIFF’S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR JUDGMENT ON THE PLEADINGS**

Consistent with this Court’s February 10, 2016 Memorandum Order, Plaintiff, ATU 1729 hereby submits this Supplemental Memorandum of Law in Support of the Motion for Judgment on the Pleadings and respectfully requests the Court enter judgment in favor of Plaintiff pursuant to Fed. R. Civ. P. 12 (c).

I. Background

This case involves an action to enforce an arbitration award issued pursuant to a collective bargaining agreement brought under Section 301 of the Labor Management Relations Act. 29 U.S.C.A. § 185 (1978). (ECF No. 1). On October 14, 2015, Plaintiff ATU Local 1729 (“ATU 1729”) moved for judgment on the pleadings. Defendants, First Group American Inc. and First Student Inc. (“First Student”) opposed ATU 1729’s motion. In connection with First Student’s opposition to the motion for judgment on the pleadings, First Student also filed a motion to stay the court’s decision pending the outcome of ongoing NLRB proceeding. (ECF

No. 20) On November 24, 2015, this Court granted First Student's request for a stay pending the outcome of the NRLB proceeding, ordering the parties to alert the court when the NRLB proceedings concluded. (ECF No. 27) On January 21, 2016, the parties jointly notified the court that the NRLB proceedings had concluded. (ECF No. 32).

Upon the parties' joint notification to the Court, the NRLB ("Board") petitioned to intervene in the instant litigation (ECF No. 28). ATU 1729 opposed the Board's intervention. On February 10, 2016 the Court granted the Board's motion to intervene. Additionally, the Court afforded the original parties in the litigation the opportunity to file supplemental briefs on the motion for judgment on the pleadings. (ECF No. 35) Accordingly, and consistent with the Court's February 10, 2016 Order, ATU 1729 hereby files this supplemental memorandum of law in support of its motion for judgment on the pleadings.

Inasmuch as this Court has preliminarily opined on the parties' original briefing on the motion for judgment on the pleadings, ATU 1729 will not reiterate here the arguments previously advanced, but rather incorporate the same as if set forth fully herein. (ECF Nos. 17 and 25). Therefore, the argument and analysis that follows center exclusively on the narrow and dispositive question of whether the "supremacy doctrine" applies to this enforcement action and if so whether the Board's decision and the arbitration award conflict such that the former takes precedence over the latter.

For the reasons that follow, the supremacy doctrine does not apply to this enforcement action. Alternatively, if the Court concludes that the supremacy doctrine does apply, the Board's decision and the arbitration award do not conflict whereby the Court must vacate the arbitration award. Stated differently, the Arbitration Award must be enforced.

II. Argument

A. The supremacy doctrine does not apply because the Board did not decide a representational issue

The Board did not decide a representational issue in the first instance and therefore the supremacy doctrine is not triggered.

There is little dispute that the supremacy doctrine announced in *Carey*, 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, establishes that an NLRB decision on a representational issue overrides an arbitrator's decision on the same issue. *A. Dariano & Sons, Inc. v. District Council of Painters No. 33*, 869 F.2d 514, (9th Cir. 1989). *See also Sheet Metal Workers Int'l Ass'n Local Union No. 27, AFL-CIO v. E.P. Donnelly, Inc.*, 737 F.3d 879, 898-99 (3d Cir. 2013); *Local Joint Executive Board v. Royal Center, Inc.*, 754 F.2d 835 (9th Cir. 1985); *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278 (9th Cir. 1984). By the same token, representation issues may not be decided by contract, and therefore may not be decided by an arbitrator. If an NLRB determination on the definition of the proper bargaining unit conflicts with an arbitration award, the NLRB decision will prevail. *Eichleay Corp. v. Int'l Ass'n of Bridge*, 944 F.2d 1047 at 1056, (3d Cir. 1991), citing *A. Dariano & Sons v. District Council No. 33*, 869 F.2d 514, 520 (9th Cir. 1989). Owing to this precedent, the salient questions in the instant case are whether the Board decided a “representational issue” and if so whether that representational decision conflicts with an arbitration award on that “same issue”.

As a threshold matter, the precedent cited by First Student concerning the application of the supremacy doctrine is limited exclusively to the resolution of a conflict arising between an arbitration award and a Board order in the context of a 10(k) proceeding. In the precise context where a section 10 (k) determination conflicts with an arbitrator's work assignment award, the Fifth and Sixth Circuits have held that the Board's section 10 (k) determination must take

precedence over a section 301 suit seeking to enforce an arbitrator's contrary award. *See International Union of Operating Engineers, Local No. 714 v. Sullivan Transfer, Inc.*, 650 F.2d 669, 676-77 (5th Cir. 1981); *U.A.W. v. Rockwell International Corp.*, 619 F.2d 580, 582-83 (6th Cir. 1980); *New Orleans Typographical Union No. 17 v. NLRB*, 368 F.2d 755, 767 (5th Cir. 1966); *see also Pepper construction Co.*, 749 F.2d at 1247; *cf. Associated General Contractors, Inc. v. International Union of Operating Engineers, Local 701*, 529 F.2d 1395, 1397-98 (9th Cir.), *cert. denied*, 429 U.S. 822, 50 L. Ed. 2d 84, 97 S. Ct. 72 (1976) (section 301 contract action not precluded by section 10 (k) ruling where former not inconsistent with latter); *Associated General Contractors of Massachusetts, Inc. v. Boston District Council of Carpenters*, 599 F. Supp. 1560, 1561-62 (D. Mass. 1985) (same).

In the instant case however, there is no 10(k) proceeding, nor is there a Board order that adjudicates any such 10(k) dispute. This Court recognized as much in its November 24, 2015 Memorandum Opinion and thus questioned whether the application of the supremacy doctrine may be stretched to render it appropriate here where no 10(k) proceeding is involved. (ECF No. 27, pps. 12-13) Unlike all cases heretofore decided under the Board's 10(k) proceedings, the Board herein was presented with a RM petition filed by First Student addressing three categories of employees (drivers, monitors and mechanics) and a UC petition filed by the employer claiming the employees represented by ATU 1729 should be accreted into a single unit represented by Teamsters Local 205. On its face, because the Board herein was not presented with nor did it decide a 10(k) dispute, the precedent advanced by First student is inapplicable and otherwise distinguishable from the facts at issue herein.

Furthermore, the RM Petition that was before the Board was dismissed "...solely as to the drivers and monitors" wherein the Board expressly determined that a question of

representation did not exist. (ECF No. 22-3, pps. 6-7) Little else is more persuasive than the Board's own finding that a representational issue does not exist. Accordingly, the Board never decided a representational issue in the first instance relating to the drivers at issue herein. The Court highlighted this fact when it opined that the Board's decision, "...was not necessarily a representational finding." (ECF No. 27 at p. 12) By contrast, it is worth highlighting for the Court that in the same RM petition, the Board did issue a representational decision relating to the "mechanics" not at issue herein. The Board's decision relating to the "mechanics" is truly a representational decision contemplated by the supremacy doctrine. The necessary "representational" decision is wanting here as it relates to the drivers and monitors subject to the instant litigation. (ECF No. 22-3, p. 41) This distinction is critical to the threshold question of whether the supremacy doctrine even applies. By its own order of at 06-RM-154166, the Board did not decide a representational issue relating to the drivers and therefore the first prong of the supremacy doctrine cannot be met.

Since the Board clearly did not decide a representational issue relating to the "drivers and monitors", the question that must be explored is what did the Board decide? As this Court correctly found, "...the crux of Regional Director Wilson's decision was her finding that '[a]dditional routes that [First Student] secured from Woodland Hills School District following its loss of the Penn Hills contract were given to the drivers and monitors represented by Teamsters local 205, consistent with the historical division of work according to school district' This was not a representational finding; the Regional Director did not cite to any Board 'policies or standards in support of it' (ECF No. 27 at pps. 10-11). This core finding was based upon the Board's interpretation and application of the parties' collective bargaining agreement and the parties' historical "past practice" relating to "work assignments". While this finding may

arguably qualify as a contract interpretation, it most certainly DOES NOT qualify as a “representational” decision necessary to the triggering of the supremacy doctrine, because, as the Court correctly notes, the Board does not point to or cite any “policies or standards” to support its finding. The heart of the Board’s finding was rooted in contractual interpretation (i.e. work assignment), not a representational decision under the Act. As noted, the supremacy doctrine applies only to a “representational decision” issued by the Board; since the Board’s decision herein *vis-a-vis* the drivers and monitors is not a representational decision, the supremacy doctrine is not implicated. It is not the role of the Court to convert the Board’s decision from one of contract interpretation to representational so that the supremacy doctrine neatly applies.

Accordingly, since the Board’s decision at 06-RM-1541566 does not decide a representational issue, it necessarily fails to satisfy the first prong required under the supremacy doctrine.

B. The supremacy doctrine does not apply because the Arbitration Award does not decide a representational issue

On the flip side of the supremacy doctrine analysis, First Student must also demonstrate the arbitration award decides the same representational issue. Here, the arbitration award does not address much less decide a representational issue. Rather, the award resolves a matter of pure contract interpretation.

Initially, First Student has already conceded at arbitration and before Board that the arbitration award does not decide matters of representational issues. Significantly, First Student admitted at arbitration that the representational issue was never raised before the arbitrator. For

example, in the arbitration award, Arbitrator Miles recited the testimony of First Student's in house labor counsel Raymond Walther on this precise issue as follows:

On cross examination, Mr. Walther acknowledged that the issue presented to the NLRB has not been raised before the Arbitrator.

(ECF No. 1, Ex. 3 at p. 8)

First Student's admission that the representational issue was never "raised" at arbitration precludes it from now asserting the Award "decided" a representational issue. First Student cannot have it both ways. If a representational issue was admittedly never raised at arbitration, much less decided, First Student cannot now assert that it was.

Furthermore, on appeal to the NLRB at Case No. 06-RM-154166, First Student again argued the award did not decide a representational issue. For example, in its appeal to the NLRB, the Union argued, *inter alia*, that the Board should have deferred to the arbitrator's award. In First Student's brief in opposition however, First Student argued that deferral was inappropriate because the award, "...**was based solely on the interpretation of the recognition clause** in the existing Local 1729-First Student agreement, resulted from a proceeding in which Teamsters Local 205 did not participate **and did not address Teamster Local 205's competing claim for representation.**". (ECF Nos. 25 and 26) As this concession plainly illustrates, First Student argued before the Board that the arbitration award should not enjoy deferral because it does not decide a representational issue yet before this Court, First Student now argues that it does. Again, First Student cannot have it both ways. First Student's admission at arbitration and before the Board that the arbitration award does not decide a representational issue is dispositive.

Additionally, and quite apart from First Student's admissions, when the arbitration award is examined it is obvious it does not decide a representational issue. Initially, the arbitration award does not so much as suggest must less decide what the definition the bargaining unit ought

to be. Moreover, nowhere in the award does the arbitrator indicate, decide or even hint that one union or the other should represent the employees employed at First Student. Quite the opposite. Indeed, Arbitrator Miles was careful to stress at the outset that he was not deciding a representational issue but rather merely interpreting the contract. On this threshold issue, Arbitrator Miles held as follows:

The undersigned is charged with the task of deciding whether the Company violated the Agreement by its actions when it assigned the 59 additional routes from Woodland Hills to the Teamsters.

As pointed out in the treatise "How Arbitration Works" when a union grieves an employer's decision to assign work to members of another union, the arbitration is held under the auspices of the grieving union's contract.

(ECF No. 1-2, at p. 13)

Arbitrator Miles made no finding on the definition of the unit or the appropriate bargaining representative of that unit. Rather, just as First Student admitted at arbitration and before the Board, the arbitrator merely decided a contract interpretation issue. The arbitration award did not decide a "representational issue", which is an indispensable requisite for the application of the supremacy doctrine.

C. The Board's decision and Arbitration Award can be read in harmony

When the Award and the Board decision are read together, it is plain that because they do not decide the same issue, they necessarily can be read in harmony such that each decision may be completely implemented, preserved and given full effect. Indeed, that the decisions do not conflict is precisely why the respective remedies square on all fours.

As to the Board's decision, ATU 1729 does not take issue with the Board's contractual interpretation finding that Teamsters Local 205 members should be assigned the work in question. ATU 1729 is not looking to disturb this finding and as such the Board's order in this regard has been and will be fully respected. Accordingly, the Board's statutory role over ensuring industrial peace is left wholly inviolate.

On the other hand, the arbitration award may likewise be enforced and given effect. For example, since the arbitration award did not decide who should represent the employees, the affected "employees" who are recalled pursuant to the Award will be, upon recall, members of Teamsters L. 205. This fully respects and otherwise complies with the Board's decision and at the same time gives fidelity to the award.

Further, the back pay piece of the arbitration award can be fully respected without doing violence to the Board's decision or authority. On this score, the Board's decision does not even speak to issues of economic remedies. By contrast, the arbitration award specifically ordered, as an economic remedy, the affected employees be made whole for all lost wages. In this regard, and entirely separate from any Board finding, the parties' labor agreement, which remains in place, requires an eight (8) hour wage guarantee. (ECF No 1-2 at p. 18).¹ The award of back pay is based, in part, upon First Student's distinct contractual commitment under the collective bargaining agreement to "guarantee" the affected employees eight (8) hours of pay. Quite simply, the pay guarantee is an independent contractual commitment entirely divorced from any finding made by the Board and therefore must be enforced as a remedy for the affected employees subject to the award; such enforcement leaves fully undisturbed the Board's finding.

¹ At Article 16 of the CBA, the guarantee varies depending on the type of driving work performed. By way of example, and though not exhaustive, there are big bus guarantees, small bus guarantees and all day run guarantees. (ECF No 1-2 at p. 18)

Once synthesized, the two decisions yield a reconcilable reading with compatible conclusions- the affected employees must be recalled to employment, issued back pay under the contractual wage guarantee and upon reinstatement become members of Teamsters 205 relating to the work assignments addressed and resolved by the Board.

III. Conclusion

For the reasons advanced above as well as those set forth in Plaintiff's initial brief in support of judgment on the pleadings and in opposition to First Student's motion to stay, ATU Local 1729 respectfully requests the Motion for Judgment on the Pleadings be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 2, 2016, I electronically filed the foregoing Supplemental Brief in Support of Plaintiff's Motion for Judgment on the Pleadings via the Court's CM/ECF system, which will send notification of such filing to the following:

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